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No. 08-962

In The Supreme Court of the United States

CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND, and HOWARD MCDOUGAL, Trustee,

Petitioners,

v.

GENERAL MATERIALS, INCORPORATED, d/b/a WHOLESALE MATERIALS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly ruled that a Participation Agreement signed contemporaneously with a Collective Bargaining Agreement ceases to obligate the Employer to make pension fund contributions after the termination of the Collective Bargaining Agreement?

2. Whether any actual conflict exists between the Seventh Circuit and the Sixth Circuit or whether the existing rulings can be distinguished on the facts in the respective cases?

3. Whether, even if there were a conflict in the Circuits, there was a separate independent basis for the dismissal of the lawsuit based on the expiration of the applicable statute of limitations?

4. Whether the Court of Appeals correctly declined to apply the arbitrary and capricious standard to its review of Petitioner's Claims relative to a Participation Agreement which was of no force or effect and which did not obligate Respondent to make any contributions?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Respondent General Materials, Inc., is a Michigan corporation and is not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation, not a party to this appeal, which has a financial interest in the outcome of this case.

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Suit was filed in the Northern District of Illinois seeking an audit and contributions allegedly due to Petitioner Central States, Southeast and Southwest Areas Pension Fund ("Central States"). Respondent General Materials, Inc. ("General Materials") in response to a pre-filing audit request indicated that its last collective bargaining agreement ("CBA") terminated on December 31, 1993; that it had no employees for which contributions were due other than Roy Swihart ("Swihart"); and that contributions were made for Swihart after the termination of the CBA pursuant to an oral agreement with Teamsters Local 164. Upon Respondent's Motion for change of venue, the case was transferred to the Eastern District of Michigan.

Central States initially sought contributions for certain individuals other than Swihart and thereafter filed a first amended complaint seeking contributions for additional individuals. Central States subsequently filed a second amended complaint dropping the claims for contributions for certain employees, but then adding claims for contributions for certain additional employees. Central States' claims for contributions varied from as high as $656,769.00 to as little as $220,000.00, (less interest, attorney fees and other statutory damages).

The parties simultaneously filed motions for summary judgment.[1] The District Court held that the conduct of the parties indicated that no one believed that a CBA was in place after the termination of the CBA on December 31, 1993. The District Court held that, applying Michigan's six year statute of limitations, all of Central States' claims were time barred (R.61, p. 10, Apx pg 194).

Both parties appealed to the Sixth Circuit Court of Appeals, which affirmed the District Court's ruling. The Sixth Circuit further explained that neither the 1991 participation agreement nor the certification clause obligated General Materials to contribute after the contemporaneously signed 1991 CBA was terminated. Petitioner subsequently sought rehearing and rehearing en banc and its requests were denied on October 29, 2008.

COUNTERSTATEMENT OF THE CASE

General Materials is a small lumberyard in Jackson, Michigan, founded in 1952 by Fred Schmid ("Schmid"). The company is now run and owned by his son-in-law, Andrew Woell ("Woell"). Schmid passed away during the pendency of the appeal. Central States is a multiemployer fringe benefit fund that receives contributions pursuant to labor agreements between the employers and local unions

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[1] Respondent filed a counter-claim for a refund of contributions made for Swihart from 1994 to 2005. That counter-claim was dismissed by the District Court and the dismissal was affirmed (although not explicitly discussed) by the Court of Appeals. No cross-petition for writ of certiorari is being filed relative to that claim.

affiliated with the International Brotherhood of Teamsters ("IBT").

As early as December 29, 1968, General Materials was subject to a collective bargaining agreement ("CBA") with IBT Local 164, ("Local 164" or "the union"). General Materials thereafter entered into a succession of IBT contracts. Each time that a new CBA was signed, General Materials and Local 164 also contemporaneously signed a participation agreement ("PA").

On December 17, 1991, General Materials and Local 164 signed their last CBA with effective dates of January 1, 1991, through December 31, 1993 (R.34, Cover page of Ex. E, Apx pg 505). The last PA was signed contemporaneously with that CBA.

On October 21, 1993, General Materials terminated the 1993 CBA, effective December 31, 1993. As of December 31, 1993, all of General Materials' employees who were Union members had retired and were drawing pensions from Central States except for two, James Smith ("Smith") and Swihart. After the termination of the CBA, General Materials continued to deduct union dues from the paychecks of those two employees only and remit the same to the Union and continued to make pension payments to Central States on their behalf.

General Materials believed that Schmid, as General Materials' representative, entered into an agreement with Local 164 whereby General Materials would continue to make contributions to Central States and to the Welfare Fund on behalf of

Smith and Swihart until each of them retired. In exchange, Local 164 would take no further actions to organize General Materials. Schmid, shortly after this lawsuit was filed, signed an affidavit to this effect (R.35, ¶ 6 of Schmid Aff., Ex. T, Apx pg 578-579). Unfortunately, Schmid's physical and mental condition deteriorated during the course of the litigation such that when his deposition was taken on September 7, 2005, he had no memory one way or the other of having entered into any such agreement or even having signed the affidavit. (R.35, ln. 16 p. 27 to ln. 4, p. 28 of Schmid's Dep., Ex. U, Apx pg 581). He has since passed away.

On July 21, 1994, Local 164 acknowledged in writing that there was no CBA in effect. No unfair labor practice ("ULP") charges were ever filed. Neither Local Union 164 nor General Materials have any records indicating that any bargaining took place after termination.

On December 31, 1994, Smith retired and, thereafter, began drawing a pension from Central States. Each month, Central States sends a form to employers in which the employer is supposed to report any changes in employee status and sign regarding the same. From January 1, 1994 through October 31, 2005, a General Materials employee signed only one (1) of those forms to show that Smith had retired as of 12/31/94 (R.34, Ex. K, Apx pg 530).

After 1991, there was never any new CBA or PA signed between General Materials and Local 164. General Materials hired over forty employees thereafter. These employees were not members of

Local 164. For each such employee, General Materials never treated them as being covered by any CBA or PA.

From January 8, 1992, to April 6, 2000, there was no evidence that Central States reviewed the status of the terminated CBA, either by inquiring with Local 164 or General Materials. Thomas Baxa ("Baxa"), Division Manager, Contributions Receivable, for Central States prior to 2004, testified on deposition that twice a year he would run a report which identified expired contracts and would send a letter to the local union advising them of the same (R.41, p. 7, ln. 9 to p. 8, ln. 11, Baxa's Dep., Ex. F, Apx pg 849). Although the CBA expired on December 31, 1993, and its records so indicated, Central States did not contact anyone until April of 2000, regarding the expired contract. Baxa had no explanation regarding why that had never happened prior to 2000. He also testified that he was not aware of any CBAs that had been purportedly renewing pursuant to an evergreen clause for seven to ten years. (R.41, p. 15, ln. 3 – 6, Baxa's Dep., Ex. F, Apx pg 851).

As of October 31, 2005, General Materials ceased paying any further voluntary contributions to Central States for Swihart. On November 3, 2005, General Materials filed a request for refund with Central States based upon the fact that the Union had denied there was ever any oral agreement for General Materials to make voluntary contributions without a CBA in effect. The refund request was denied by the Trustees of Central States on December 14, 2005.

Based on the vesting requirements of the Central States Pension Plan, Swihart is the only individual employed at General Materials, from December 31, 1994 on, who will ever be entitled to collect any pension benefits from Central States. Throughout the course of these proceedings, General Materials has indicated that, to the extent Swihart's pension benefit is reduced, General Materials would cover the difference between what he would have received if he retired with 30 years of service and what he ultimately receives as a pension from Central States.

In regard to Smith, after the Court of Appeals' decision, Central States unilaterally reduced his pension from $2,000 to $486.50 per month and has threatened to sue him to recover alleged overpayments in the amount of $249,727.50. Smith has retained separate counsel and an administrative appeal of Petitioners' decision has been filed by Smith.

No evidence was presented suggesting that any employee or former employee of General Materials, other than Swihart and Smith, is in any way impacted by the decisions in this case. Likewise, no evidence was presented suggesting that the decisions in this case will have any impact on any other retirees currently drawing pensions from Central States.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Correctly Ruled That A Participation Agreement Alone Could Not Support General Materials' Obligation To Contribute When The Contemporaneously Executed Collective Bargaining Agreement Had Been Terminated.

The Sixth Circuit correctly affirmed the ruling of the District Court that no contributions are due from General Materials to Central States. The Court of Appeals went a step beyond the District Court, which based its ruling in part on Michigan's six year statute of limitations for contracts, and ruled that neither the 1991 PA nor any certification clause(s) on monthly billings obligated General Materials to make contributions after the 1991 CBA was terminated. This ruling is correct and, for that reason, the petition for certiorari should be denied.

Central States brought the action pursuant to 29 U.S.C. § 1132(g)(1), alleging that General Materials failed to make contributions as required under the terms of the plan and the CBA. Section 1132(g)(1) requires an employer to make contributions only to the extent not inconsistent with law. Payments which are illegal under 29 U.S.C. § 186 are an exception to an employer's obligation under § 1132(g)(1). 29 U.S.C. § 186 provides:

> (a) it shall be unlawful for any employer or association of employers... to pay, lend or

> deliver, or agree to pay, lend, or deliver, any money or other thing of value.
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce.

However, § 186(c)(5) provides that:

> The provision of this section shall not be applicable...with respect to money or other things of value paid to a trust fund established by such representative...Provided...(B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer.

Numerous Sixth Circuit cases recognize that estoppel cannot supply the written agreement required by § 186(c)(5). In Merriman v. Paul F. Rost

Electric, Inc., 861 F.2d 135 (6th Cir. 1988), the Court noted:

> This Court is aware that a literal construction of section [186(c)(5)] effectively forces pension funds, which are third-party beneficiaries of labor agreements, to be more vigilant as to the formalities of execution than are the parties to those agreements. However, what disparity may exist in this regard derives from the express and unmistakable terms of Congress mandate. Id. at 139.

Thus, the Sixth Circuit has concluded that there must be a written contract, signed by the employer, which sets out the employer's obligation to make contributions. This concept makes legal sense and is recognized in other circuits. For example, as the Ninth Circuit observed in Sheet Metal Workers v. West Coast Sheet Metal Company, 954 F.2d 1506 (9th Cir. 1991):

> A contract to contribute to a trust fund of a Union with which [the employer] has no ongoing collective bargaining relationship makes no sense. The trust fund provisions have no legal effect when the Union is no longer the certified representative of [the employer's] employees. Id., at 1509.

In the matter presently before the Court, Central States contended that the 1991 PA was

sufficient to provide a "contract" as required by 29 U.S.C. § 186(c)(5)(B) and that, in essence, General Materials is estopped from denying the existence of an agreement to make contributions, since it never specifically terminated the PA. The settled, consistent law of the various circuits and the specific, undisputed facts in this case indicate that there was no contemporaneously signed CBA in effect and that, as a result, no further contributions are due from General Materials.

In Firesheets v. A.G. Building Specialists, Inc., 134 F.3d 729 (5th Cir. 1998), the employer was a party to a CBA requiring contributions to a benefit trust fund. In 1984, the employer advised the union local of its desire to terminate the CBA. Id., at 730. The parties met to negotiate a new agreement but no agreement was ever prepared or signed. Id. From 1984 forward, the employer solely set, determined, and modified the terms of employment for its employees with no input from the union. Id. The employer continued to make voluntary contributions to the trust fund on behalf of some of its employees for approximately ten years after the expiration date of the original agreement. Id. Beginning in 1992, contributions were made for only one employee until the last contribution was made in 1994. Id. During this time, the employer continued to file contribution reports and complied with changes made in the contribution rates. Id.

The trust funds argued that 1) the original CBA did not terminate; or 2) a new CBA was reached; or 3) Employer was bound by its conduct to continue making contributions. The District Court

rejected all three arguments and was affirmed by the Fifth Circuit. Id., at 731. The Court of Appeals held that the original contract terminated by its own terms and that submission of contribution reports was insufficient to create a new CBA. The Fifth Circuit noted that the employer hired nonunion employees, set wages, and made trust fund contributions only for employees who asked for contributions. The Court found these actions to be inconsistent with any intent to be bound by a new agreement.

The facts in Firesheets are analogous to those in the instant dispute, in that General Materials never acted in a manner that was consistent with having a CBA in place. As such, only the PA could be interpreted as providing the basis for continuing contributions. However, the contribution obligation of the PA is wholly dependent on the existence of a contemporaneously signed underlying CBA. In numerous provisions, the PA refers to the existence of a CBA. By virtue of its own language, the PA is meaningless without the existence of an underlying CBA. This is underscored by the problem that Central States had in this case of trying to define job classification(s) which existed after the termination of the CBA, but which simply did not exist at General Materials in 1993. Since there is no CBA in existence, Central States attempted to argue what ***might*** have happened over the ten-year period when there was no CBA and what the union ***might***, or ***might not*** have done. Such an analysis is nonsensical.

This situation is contrasted with the case upon which both parties relied in front of the Sixth Circuit, Central States v. Behnke, 883 F.2d 454 (6th Cir. 1989). In Behnke, *after* the CBA expired, the Union and Behnke Trucking signed two new agreements. Id., at 457. One was a form PA, undoubtedly similar to the one in this case. The other was a Fringe Benefits Interim Agreement ("Interim Agreement"), which obligated the employer to pay "whatever rate is required to maintain" health and welfare benefits for Local 34..." Id., at 461. The Interim Agreement also specifically stated that the parties were signing it as a temporary agreement, to permit and require the new fringe benefits, while and until the full CBA was prepared and executed in final form. Based on the Interim Agreement and the PA signed at the same time, the Court held that Behnke was required to contribute up until the date a new CBA was signed.

The situation in Behnke is very different from the facts here. Here, there was no interim or any other agreement which was effective after 1993. The PA in Behnke was only of importance because it was signed ***at the same time*** as the Interim Agreement. As the District Court observed in rendering its opinion in this matter:

> ...in Behnke, the parties were in between collective bargaining agreements at all relevant times. In this case, the parties never entered into another CBA after the 1991 agreement, which expired by its terms on the last day of 1993. (R.61, p. 8, Apx pg 192).

The Court of Appeals correctly ruled that the PA did not extend, by its own terms, beyond 1993. The PA was insufficient to require continuing obligations for over ten years after the termination of the CBA in 1993. The ruling of the Court of Appeals is correct and the petition should be denied.

II. No Conflict Exists Between The Rulings Of The Seventh Circuit And Sixth Circuit Courts Of Appeal.

Petitioner relies on an asserted conflict between the Sixth Circuit and the Seventh Circuit, citing two cases, one published and one unpublished. Both cases are distinguishable on the facts and indicate the lack of an actual conflict.

First, Petitioner cites Central States Pension Fund v. Schilli Corp., 420 F.3d 663 (7th Cir. 2005). The central issue in that case was whether the decertification of a union acted, as a matter of law, to terminate the employer's obligation to contribute under a PA. Central States argued that it did and for that reason, there was a partial withdrawal from the pension plan in the year of the decertification, with a corresponding withdrawal liability. The Employer argued that there was no withdrawal until a few months later in 1998 when Central States was notified of the decertification. The reason for the controversy between the parties was because of the difference in the withdrawal liability which was higher in 1997, (when Central States contended that there was a partial withdrawal), than in 1998 (when the Employer contended the withdrawal took place).

The issue was arbitrated, as provided by statute, and the arbitrator affirmed the Employer's position.

Petitioner was put in the interesting position of advocating the exact opposite of the position it has taken throughout this litigation. In short, it contended that without a valid CBA, a PA has no force or effect. Id., at 669. The Seventh Circuit noted various additional arguments that Central States could have made and concluded by stating that its limited holding was that: "the decertification of Local 878 did not terminate [the employer's] obligation to contribute, for withdrawal liability purposes, by operation of law." Id., at 672.

Central States attempts to stretch the limited holding in Schilli to stand for the proposition that the obligation to contribute under a PA continues forever, regardless of whether a CBA exists. As set forth above, the holding in Schilli was limited to the issue of when withdrawal liability existed and not the issue in the case at bar of whether the obligation under a PA would continue for some twelve years after the termination of the contemporaneously executed CBA.

Second, Petitioner cites Central States Pension Fund v Depew Development, Inc., 172 F.3d 52, 1998 WL 894642 (unpublished decision)(7th Cir. 1998). In that unpublished decision, the employer engaged in a number of attempts to avoid its obligations to Central States, including setting up a subsidiary that had only one union employee, while keeping all of its other employees in another corporation. The central basis for the Seventh

Circuit affirming the District Court's finding that contributions were owed to Central States for more than just the one employee, was that there was still a CBA in place that was renewing on a year-to-year basis. Id., at 15 - 17. Thus, the PA could be read together with the unexpired CBA to require continued contributions.

The second basis for the holding was that a separate PA signed by the employer in 1990, (signed without the contemporaneous execution of a CBA), could, by itself, support an obligation to contribute without an underlying CBA. Key to this holding was the timing of the signing of the various agreements. The Employer signed a pre-existing CBA in 1985 and it ran from 1984 to 1987. In 1985 it also contemporaneously signed a PA. In 1990, the Employer signed a new PA with the Union which obligated it to make different and higher contributions than the 1985 PA. No new CBA was signed until 1993. What the Seventh Circuit held, which is completely consistent with the holding of the Sixth Circuit in the matter presently before this Court, was that, based on the timing and specific facts in that case, the 1990 PA constituted a separate obligation to make contributions on behalf of its employees.

Petitioner fails to observe that a separate, subsequent PA was signed by the employer in Depew Development, in contrast to General Materials' situation where the CBA was explicitly terminated in 1993 so there was no question of an evergreen clause and, thereafter, no additional PA was signed. The key to the Sixth Circuit's holding, and what

makes it consistent with the Seventh Circuit's holding in Depew Development is that in the case at bar the CBA and the PA were executed contemporaneously and one could not be read without reference to the other. In such a case, no other conclusion could be reached, but that termination of the CBA terminates the obligations under the PA. Thus, contrary to Petitioners' assertions, there is no conflict in the Circuits and the petition should be denied.

III. Even If A Circuit Conflict Existed, This Case Would Present A Poor Vehicle For Resolving It.

Petitioners argue that the Supreme Court should grant its petition because the Sixth Circuit's holding will have a negative effect on the Petitioners and will have a widespread impact on retirees. Nothing could be further from the truth. As set forth above, the facts in this case indicate that, for in excess of ten years, Central States simply ignored General Materials and was happy to continue taking the contributions for one employee. From the time that Central States began the litigation in 2004, it was clear to Respondent that Central States was dealing with a weak factual scenario and using its size and power in an attempt to force General Materials into paying contributions for employees that would never draw a pension from Central States. In effect, Central States was seeking to increase the size of its dwindling coffers without any corresponding increase in its pension liability.

The resolution of this case has no effect on anyone except General Materials, Swihart, and Smith. There will be no widespread impact. Arguably, Central States is in a better position now than it would have been if it had prevailed, because it has unilaterally reduced its obligation to pay pension benefits to Smith and has indicated that, in paying a pension to Swihart, it will not take into account any contributions after January of 1994, (which contributions it also refused to refund to Respondent). If the Supreme Court granted the Petition and Central States ultimately prevailed, the amount of contributions due from General Materials would be less than its continuing obligation to Smith alone. For these reasons, the petition should be denied.

IV. If There Were A Conflict Between The Circuits, Granting The Writ Would Serve No Practical Purpose, Since The Statute Of Limitations Provides A Separate And Independent Basis For Dismissal Of Petitioners' Claims.

The District Court correctly held that Central States should have known by March of 1995 that underpayments were being made and therefore its cause of action accrued in March of 1995. The District Court further held that applying Michigan's six year statute of limitations, all of Central States' claims were time barred (R.61, p. 10, Apx pg 194). In Michigan United Food v. Muir Company, Inc., 992 F.2d 594, 599-600 (6th Cir. 1993), the Court held that the pension fund's claims were barred by the statute of limitations when "the facts in this case show that

the Funds, by conducting an internal audit using information already within their possession, had the ability to discover probable discrepancies and underpayments at any time after the employer's monthly reports were received." The Michigan United Court noted that in defining the concept of due diligence, the Court had "looked to what event should have alerted the typical lay person to protect his or her rights." Id., at 600. The Court noted that the Welfare Fund was hardly in the position of a "typical lay person," and instead, "were experts in the accounting methods required to detect the kind of reporting errors involved in this case." Id., at 600. Thus, the Court concluded that, "information sufficient to alert a reasonable person to the possibility of wrongdoing gives rise to a party's duty to inquire into the matter with due diligence." Id., at 600.

Here, the District Court found that Central States had information available to it which gave rise to a duty to inquire into the matter with due diligence. Central States' self-serving assertion that it neither knew, nor could have known, of any underreporting prior to 2004 defies common sense. The District Court's ruling on this issue was correct, was not disturbed by the Court of Appeals, and provides an alternative basis for reaching the same result as the Sixth Circuit Court of Appeals. For that reason, the petition should be denied.

V. The Trustees Were Never Asked To Determine The Issue Of Whether Contributions Were Due, And No Error Was Committed Relative To The Review Of That Issue.

Petitioner contends that the Sixth Circuit committed error by not reviewing the decision of the Central States' Trustees under the arbitrary or capricious standard of review. No error has been committed as the Sixth Circuit correctly held that, as a matter of law, the PA could not support the existence of an obligation to contribute after the termination of a contemporaneously executed CBA.

Central States filed suit seeking an audit and contributions. Prior to filing suit, its Trustees never made any determination of whether contributions were due. After litigation had been underway for some time, General Materials submitted its request for a refund of contributions paid for Swihart within the preceding 10 years. General Materials did not invoke or rely upon the PA in making its request as it believed that its request should be reviewed by the Trustees pursuant to the Trust Agreement. Contrary to Petitioner's assertions, General Materials never submitted to the Trustees the issue of whether any contributions were owed after December 31, 1993.

The Trustees subsequently denied the request for refund and it is this denial of the request for refund that is relied upon by Petitioner as the basis for its argument that the arbitrary or capricious standard should apply to the entire case, rather than

just to the determination that no refund of contributions was due pursuant to Respondent's counter-claim.

The District Court said that, even if the arbitrary and capricious standard were applied, the finding by the Trustees was arbitrary or capricious as any claim was barred by the six year Michigan statute of limitations. The holding of the Court of Appeals was that the PA had no effect after the CBA was terminated, effective December 31, 1993. As the PA was not in effect, its provisions dealing with the consideration of issues under the PA were of no effect. This argument was nothing more than an attempt by the Petitioners to bootstrap their way to a better standard of review. The Court of Appeals correctly refused to consider this argument and its refusal was consistent with its overall holding. For this reason, the petition should be denied.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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